(26) AFR

29/11/07

HIGH COURT OF CHHATTISGARH AT BILASPUR

APPELLANT **ARJUN THAPA @ SUNIL KAMBOZ**

VERSUS

RESPONDENT **STATE OF CHHATTISGARH**

JUDGMENT

POST ON 28 NOVEMBER 2007

Sd/-
DHIRENDRA MISHRA
Judge

(27)

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.488 of 2005

APPELLANT **(In jail)**	Arjun Thapa, @ Sunil Kamboz, S/o Mangatram Kamboz, aged about 28 years, R/o Manoharpur P/S. Biharigarh, District Saharanpur (U.P.)
VERSUS	
RESPONDENT	State of Chhattisgarh Through P/S Tikrapara, Raipur

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Present: Mr. S.K. Tiwari, counsel for the appellant.
Mrs. Madhunisha Singh, Panel Lawyer for the State.

JUDGMENT

(Delivered on 28th November 2007)

Dhirendra Mishra, J.

This criminal appeal is directed against the judgment of conviction and order of sentence dated 16th March 2005 passed in S.T. No.270/03 whereby learned XIV Additional Sessions Judge (FTC), Raipur has convicted the appellant under Sections 458, 394 read with Section 397 of the Indian Penal Code and under Section 25(1)(a) read with Section 27 of the Arms Act and sentenced him to undergo RI for five years, pay a fine of Rs.2,000/- and in default thereof to undergo additional RI for one year, RI for seven years, pay a fine of Rs.5,000/- and in default thereof to undergo additional RI for fifteen months and to undergo RI for five years, pay a fine of Rs.2,000/- and in default thereof to undergo additional RI for one year, respectively. All the sentences have been directed to run concurrently.

2. Case of the prosecution, in brief, is that on 16.3.2003 at about 10.20 p.m. when complainant Aasif Khan, cashier of the petrol pump and other employees namely Rajjan Shukla, Vijay Singh, Ramesh Vishwakarma, etc. were present in the petrol pump, one person came in their chamber and asked about some address and thereafter went from there with the person who had come with him. Both of them again came there around 10.30 and demanded Rs.1,000/- and on refusal by complainant Aasif Khan, both of them took out country made pistol (*Katta*) and started demanding money. Another person who was fatty fired on the ground. At that time employee of the petrol pump Ramesh came forward, whereupon the fat person assaulted him with the butt of the country made pistol and closeted the employees of the pump in a room. The fat person placed pistol against head of the complainant whereas the

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other thin and tall person started taking out money from the drawer. At that time employees of the pump came there and the person who was taking out money started running away. He was chased by the boys and was overpowered. However, the second robber managed to flee from there. The other robber was tall having long teeth. The fat person identified himself as Jabbar whereas he informed that his accomplice was Arjun Thapa.

3. The accused persons looted a sum of Rs.8,199/-. The complainant had sustained injuries on his left arm. The written report was lodged vide Ex.P/1 by complainant Aasif Khan (PW-1). In the above incident Ramesh Vishwakarma and Aasif Khan sustained injuries and they were sent for medical examination to Ambedkar Hospital, Raipur where Dr. S. Bosh examined them and gave his reports of Ex.P/12 and P/14. In the test identification parade conducted by Subhash Tiwari, complainant Aasif Khan (PW-1) identified Irfan Khan vide Ex.P/3 and in the test identification parade conducted by K.K. Sharma, Executive Magistrate, the complainant identified appellant Arjun Thapa vide Ex.P/4. One country made pistol, three live cartridges of 315 bore, cash amount of Rs.6,910/- were taken into possession vide Ex.P/6 from the appellant whereas one empty of 315 bore and broken bullet of brass were taken into possession from the place of incident vide Ex.P/7. Recovery of bag, pant, shirt etc. were also made from co-accused Irfan Khan vide Ex.P/9.

4. After completing investigation charge sheet was filed against the appellant, co-accused Irfan Khan and Gullu @ Jabbar in the Court of Judicial Magistrate First Class, Raipur and the same was received on transfer for trial by the learned Additional Sessions Judge. However, from perusal of the record it appears that accused Jabbar absconded during pendency of the trial.

5. During trial the prosecution examined 14 witnesses in all. Thereafter, statements of the accused persons were recorded in which they denied the evidence appearing against them in the prosecution case and pleaded innocence and false implication. The appellant also took a defence that as owner of the petrol pump is an influential political person, there was a dispute between Jabbar and employees of the petrol pump in relation to filling of petrol, *marpett* had also taken place, therefore, just to escape from the report a false case has been lodged against them. Learned trial Court after hearing counsel for the respective parties

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convicted and sentenced the appellant as mentioned in paragraph 1 of this judgment. However, accused Irfan has been acquitted.

6.. Learned counsel for the appellant submitted that the prosecution witnesses did not know the appellant before the incident, the appellant was not named in the First Information Report and his identity is not established. The appellant was arrested from the railway station on 17.3.2003 though there is no nexus of the appellant with the above crime. The test identification parade was conducted on 23.5.2003 i.e. after more than two months of his arrest and there is no explanation for delay in conducting the test identification parade. Moreover, there is no evidence in the charge sheet that the appellant was produced during remand proceedings under veil and therefore, there was ample opportunity for the complainant to see the appellant during remand proceedings. Even this witness has admitted in his cross-examination that he had seen the appellant in the police station earlier. In these circumstances, the test identification parade looses its efficacy. It is further argued that as per the prosecution case co-accused Jabbar was arrested from the place of incident at the time of incident itself, however, arrest memo shows that the present appellant was arrested on 17th March 2003 even before the arrest of absconding accused Jabbar. No permission has been obtained from the concerned District Magistrate and proved by the prosecution for prosecuting the appellant under the Arms Act.

7. Reliance is placed on the judgments in the matters of **Ravi @ Ravichandran V. State**,[1] **Pradip Chakma Vs. State of Tripura**,[2] **S. Mange Naik V. State of A.P.**,[3] **State of Rajasthan V. Netrapal & Ors.**,[4] **Kallan V. State of U.P.**,[5] and **Fateh Mohamad Gulmohamad Sayed and etc. V. State of Maharashtra**.[6]

8. On the other hand, learned counsel for the State supporting the impugned judgment of the trial Court contended the appellant has been duly identified in the test identification parade by the complainant who sustained injuries in the same incident. The appellant has also been identified by other eyewitnesses namely Ramesh Vishwakarma, an injured eyewitness (PW-7) and witness Vijay Singh Thakur (PW-8). There is clear

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1. 2007 Cri.L.J. 2740
2. 2007 Cri.L.J. 2785
3. 2002 Cri.L.J. 2892
4. 2007 Cri.L.J. 1783
5. 2001 Cri.L.J. 4403
6. 2003 Cri.L.J. 3586

description of the appellant in the promptly lodged Dehati Nalishi and he has also been named in the First Information Report as co-accused Jabbar identified him as Arjun Thapa. The learned District Magistrate has accorded permission for prosecuting the appellant under the Arms Act and the same is available on record. The weapon of offence i.e. country made pistol as also the robbed amount have been seized from the appellant the very next day of the incident.

9. I have heard learned counsel for both the parties and have perused the material available on record as also the impugned judgment.

10. Conviction of the appellant is based on the statements of complainant Aasif Khan (PW-1), Vijay Singh Thakur (PW-2), Ramesh Vishwakarma (PW-7) as also the statement of Executive Magistrate K.K. Sharma (PW-6) who conducted test identification parade, in which the appellant was correctly identified by the complainant Aasif Khan.

11. PW-1 Aasif Khan, the complainant, has proved the Dehati Nalishi of Ex.P/1 and has stated that on the date of incident he was employed as cashier in the petrol pump where all the three accused persons present in the Court entered in the counter of the petrol pump, appellant and Jabbar were holding country made pistols, Jabbar demanded Rs.1,000/- from him and on his refusal he fired from the country made pistol near the counter. At that time employees of the petrol pump namely Vijay Singh Thakur, Rajjan Shukla, Anwar Khan, Ramesh Vishwakarma, Shyamraj Sen were also present. The accused persons closeted them in the inner cabin and robbed Rs.50,000/ to 55,000/- from the cash box and when they were trying to flee, accused Jabbar was caught by them, however, accused Sunil Kamboz and Irfan managed to flee. While he was trying to catch accused Jabbar, he inflicted injuries by knife over his right hand. He has further stated that the test identification parade was conducted by the Executive Magistrate K.K. Sharma (PW-6) in which he correctly identified Arjun Thapa vide Ex.P/4. He has stated in paragraph 11 that before the test identification parade he had seen all the three accused persons in the police station. He has denied the suggestion that a quarrel had taken place between the accused persons and employees of the petrol pump whereupon the accused persons were beaten by them, as a result of which they sustained injuries.

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12. PW-2 Vijay Singh, who is also a witness to the incident has stated that two accused persons except Irfan came there running inside the petrol pump and accused Jabbar asked for Rs.1,000/- and thereafter started arguing with Ramesh Vishwakarma. In the meanwhile, Jabbar fired from the country made pistol and Sunil closeted them inside the cabin on the gunpoint and the accused persons started running away after taking out money from the cash box. Two other accused persons managed to escape whereas accused Jabbar Khan was caught by the employees of the petrol pump. They learnt about the name of the accused persons after the incident. Only 10 minutes after the incident Jabbar was caught and rest of the accused persons were caught from the station. They were caught within half an hour of the incident. He has also denied the suggestion that a dispute ensued between them and the accused persons in connection with filling of petrol.

13. PW-7 Ramesh Kumar Vishwakarma has also deposed in the similar lines. He has further stated that Jabbar pointed country made pistol against his head and he had tried to snatch the pistol. Accused Jabbar had fired from the pistol and they fled from the petrol pump after robbing Rs.40,000/- to 45,000/-. Jabbar had also assaulted him from the butt side of his pistol over his head and he had sustained bullet injuries on his right hand. He has identified the appellant in the court as the person who entered in the petrol pump with Jabbar. He has further stated that the appellant was arrested from the station at about 1.30 in the night by the police and he had also sustained injuries over his head.

14. PW-8 Rajkumar Tandon has turned hostile and he has not supported case of the prosecution. PW-12 Shyamraj Singh, an employee of the petrol pump and witness of the incident, has also identified the appellant as the person who came to the pump with Abdul Jabbar with country made pistol and looted the cash box after firing from the pistol. However, the appellant managed to flee from there and accused Jabbar was caught while he was trying to flee. PW-4 Dr. S. Bosh has examined Ramesh Vishwakarma and noticed one lacerated wound over his skull and another incised wound over his right arm. His injury report is Ex.P/12. He also examined complainant Aasif Khan and noticed one lacerated wound on the left hand and one incised injury on the right arm and third incised wound on the middle finger of the right hand. PW-6 K.K.Sharma, Tehsildar, has conducted the test identification parade in jail where

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complainant Aasif Khan (PW-1) identified appellant Arjun Thapa @ Sunil Kamboz vide memo of Ex.P/4.

15. In the matter of *Ravi @ Ravichandran*[1] the Hon'ble Supreme Court has held that the substantive evidence of identification of an accused is the one made in the Court and the accused can be convicted even if no test identification parade has been held. However, in case where the First Information Report has been lodged against unknown persons, it is incumbent upon the prosecution to arrange for a test identification parade and such parade should be held as early as possible to exclude the possibility of the accused being identified either at the police station or at some other place by the concerned witnesses and conviction should not be based on vague identification.

16. In *State of Rajasthan V. Netrapal*[4] the Hon'ble Supreme Court in paragraph 6, on the basis of evidence available in that case, observed that the accused persons were arrested just after 7-8 days of the incident, however, their arrest was shown much later and for number of days the accused persons were detained at the police station and in these circumstances, it was held that arrest of the accused persons, their giving information as well as the recovery were "all false ones and they all have manipulated later on".

17. In the matters of *Kallan*[5] *& Pradip Chakma*[2] conviction of the appellant was based on the identification evidence as the appellant was not named as accused person in the First Information Report and there was no recovery of the stolen or looted properties from his possession. In that case it was held that in a case based on the identification evidence, it is obligatory for the prosecution to establish that soon after commission of the crime and arrest of the accused, he was put for identification along with several others and in such identification parade, the witness had correctly identified the accused. In absence of such an evidence regarding identification by a witness in an earlier identification parade the testimony of the witness which has been given for the first time in the Court wherein he points to a particular person standing in the dock as one of the accused who had participated in the crime, cannot be accepted.

18. In the case of *Fatesh Mohamad Gulmohamad Sayed*[6] the learned Single Judge of the Bombay High Court in paragraph 11 of the judgment considering that the case of the prosecution entirely depends upon

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identification of the culprits by the two witnesses who were frightened during entire episode, held that they could not have coolness of mind in observing the features of the culprits. Even they committed error in giving description of the culprits, identification in the Court gets weakened particularly when they happen to be strangers to the prosecution witnesses.

19. In the matter of *S. Mange Naik* [3] the Andhra Pradesh High Court dealing with Section 39 of the Arms Act has held that sanction as contemplated under Section 39 of the Arms Act is not an empty formality and it is introduced to safeguard the persons against any false or frivolous prosecution. When once a sanction order is issued by the District Magistrate, somebody on behalf of the Department shall come before the Court and mark the same as an exhibit and where the document, though available in the record, has not been marked as an exhibit, the same cannot, therefore, be used as evidence.

20. From the evidence adduced by the prosecution which has been discussed in the foregoing paragraphs it has been established beyond doubt that after committing robbery in the petrol pump when the accused persons were trying to flee from the place of incident, one of them namely Abdul Jabbar was apprehended by the employees of the pump and the public immediately who disclosed his name as also the name of his accomplice i.e. the appellant to them. On the basis of above information, injured complainant Aasif Khan (PW-1) lodged Dehati Nalishi of Ex.P/1 only 10 minutes after the incident at 22.40 hours naming the appellant as perpetrator of the offence and describing in detail the manner in which the offence was committed. The appellant was arrested on the very next day on 17.3.2003 at 15.00 hours from the railway station. There is evidence available on record that there was scuffle between the employees of the petrol pump and the accused persons and it is not a case that the witnesses were frightened, they did not attempt to apprehend the accused persons and on the contrary, they had ample opportunity to see the features of the culprits that the appellant was a thin and tall person having long teeth. It is true that the identification conducted by the Executive Magistrate K.K. Sharma, in which the complainant had identified the appellant as offender looses its value particular in view of admission of the complainant that he had an occasion to see the appellant earlier in the police station and that the test identification parade was

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conducted on 23.5.2003 i.e. almost after two months one week of the arrest of the appellant. Nevertheless other three witnesses including eyewitness Ramesh Vishwakarma, have correctly identified the appellant as the person who came in the petrol pump armed with country made pistol with accused Jabbar and committed the above offence. In these circumstances, judgments relied upon by learned counsel for the appellant have no application in the present case and the same are distinguishable on facts as mentioned above.

21. However, the prosecution has not proved the sanction granted by the District Magistrate under Section 39 of the Arms Act by examining any witness and exhibiting the document. Since the document has not been exhibited the Court could not have based its finding, that due sanction was accorded by the District Magistrate, on that document, therefore, conviction of the appellant under Section 25(1)(a) read with Section 27 of the Arms Act cannot be sustained. However, the prosecution has been able to establish the charge against the appellant under Sections 458, 394 read with Section 397 of the IPC by leading trustworthy and reliable evidence.

22. In the result, the appeal is partly allowed. Conviction of the appellant under Section 25(1)(a) read with Section 27 of the Arms Act and sentence passed thereon, are set aside. He is acquitted of the above charge. However, so far as his conviction and sentence under Sections 458 & 394 read with Section 397 of the IPC is concerned, the same is maintained and appeal against the same being devoid of substance is hereby dismissed.

Sd/-
DHIRENDRA MISHRA
Judge